IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-718

MICHAEL A. S. MAKRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

LEWIS AND ROCA

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Pursuant to Supreme Court Rule 58 (2) Petitioner, Michael A. S. Makris, requests rehearing of the denial of his petition for writ of certiorari. The United States brief in opposition to that petition was filed so late that no reply could be submitted and the government's brief seriously misstates the applicable law.

Petitioner's brief was docketed in the Supreme Court on November 22, 1976, with a corrected appendix being filed on December 15, 1976. Although this Court's Rule 24 calls for filing of briefs in opposition within 30 days, petitioner

did not receive the government's brief until March 21, 1977, a full two months after it was due. Because of the lateness of that filing, petitioner was unable to file a reply brief prior to this Court's ruling. Such a reply brief is permitted by Rule 24 (4).

The primary issue is whether the trial court's failure to hold a competency hearing prior to trial as required by 18 U.S.C. § 4244 necessitates a retrial. Petitioner's opening brief cited the rule in the Ninth and District of Columbia Circuits requiring such a retrial; a conflict with the Fifth Circuit ruling in this case permitting a retrospective determination of competency. In its brief in opposition, the United States said no such rule existed in the Ninth Circuit, citing *de Kaplany v. Enomoto*, 540 F.2d 975, 986, note 11 (9th Cir. 1977), a case decided after our petition was filed. *de Kaplany* involved the denial of a petition for writ of habeas corpus arising from a state court conviction. It is not an appeal from a conviction in federal court where 18 U.S.C. § 4244 would apply.

de Kaplany did not cite the Ninth Circuit cases upon which we rely, *United States v. Irvin*, 450 F.2d 968 (9th Cir. 1971); *Morris v. United States*, 414 F.2d 258 (9th Cir. 1969); *Meador v. United States*, 332 F.2d 935 (9th Cir. 1964); and they are unaffected. Those cases specifically recognize the distinction between collateral attacks on convictions raising fundamental constitutional rights, such as a petition for writ of habeas corpus, and direct appeals from convictions where the defendant was denied his pretrial hearing as required by 18 U.S.C. § 4244. The language in *Meador* is still the law in the Ninth Circuit:

> "Where, as here, the error in failing to call for psychiatric examination before denying a section 4244 motion is determined in an appeal from the

> conviction, as a distinguished from an appeal in a collateral proceeding, and there are no special circumstances which would warrant a different disposition; we believe that the appropriate remedy is to reverse the judgment and remand the cause for a new trial, with opportunity for a determination of appellant's mental competency to participate in the new trial." 332 F.2d at 938.

That remains the rule in the Ninth Circuit and District of Columbia Circuit. Therefore the conflict, which the United States denies, does exist.

In light of this real conflict between the Circuits, this Court should hear this matter and Makris' petition for writ of certiorari should be granted.

Respectfully submitted,

LEWIS AND ROCA

By John P. Frank
Andrew S. Gordon

JEFFERSON, MANESS,
VALDES & MIMS

Attorneys for Petitioner

April, 1977.

CERTIFICATION

John P. Frank, counsel for petitioner Michael A.S. Makris, certifies that this petition for rehearing is presented in good faith and not for delay, and this petition is restricted to the grounds above specified.

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JOHN P. FRANK
By: James J. Bierbower

SUBSCRIBED AND SWORN to before me this _____ day of April, 1977.

_____

Notary Public

My Commission Expires:

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